

**UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA**

ALLAN MOONEY,

Plaintiff,

v.

Case No.: 13-CV-00648 (DWF/JJG)

FRITO-LAY NORTH AMERICA, INC.,
and PEPSICO, INC.,

Defendants.

**DEFENDANTS' MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR
AN EXTENSION OF TIME TO RESPOND TO PLAINTIFF'S COMPLAINT**

Pursuant to Rule 6(b)(1)(A) of the Federal Rules of Civil Procedure, Defendants Frito-Lay North America, Inc. and PepsiCo, Inc. (collectively “Defendants”) respectfully move for an enlargement of time to file an answer or otherwise move in response to Plaintiff’s Complaint. Counsel for Defendants requested an extension from Plaintiff’s counsel, but that request was denied.¹

BACKGROUND

On February 20, 2013, Plaintiff Allan Mooney served a copy of the summons and complaint (the “Complaint”) on Frito-Lay’s registered agent for service. [Doc. No. 1, Ex. A.] The Complaint was captioned as a state court action, but was not filed. The Complaint alleges that “all natural” labels on certain Frito-Lay Tostitos and SunChips

¹ See Defendants’ Local Rule 7.1 Meet-and-Confer Statement filed contemporaneously with this Motion and Memorandum.

products sold from January 1, 2010 through the present are deceptive and misleading because the products contain genetically modified organisms. Compl. ¶ 1. The Complaint is a copycat of eleven (11) other actions filed against Frito-Lay over the past year-and-a-half challenging “all natural” labeling on Tostitos and SunChips products based on the use of vegetables grown using bioengineering techniques.

The earlier-filed actions were centralized by the Judicial Panel on Multidistrict Litigation (“JPML”) in the Eastern District of New York in December 2012, and consolidated for pre-trial proceedings by the E.D.N.Y. in January 2013. *See Transfer Order, MDL No. 2413, ECF No. 28 (J.P.M.L. Dec. 12, 2012); Conditional Transfer Order Finalized, MDL No. 2413, ECF No. 31 (J.P.M.L. Dec. 20, 2012); Joint Request and [Proposed] Case Management Order, In re Frito-Lay “All Natural” Litigation, No. 12-MD-02413-RRM-RLM (E.D.N.Y., Jan 18, 2012), ECF No. 5; Order re ECF No. 5, In re Frito-Lay “All Natural” Litigation, No. 12-MD-02413-RRM-RLM (E.D.N.Y. Jan. 25, 2013)* (“MDL Action”).

Defendants have not yet answered or responded to the complaints in the MDL Action. Defendants intend to move to dismiss the complaints and have communicated that intention to the MDL court. In response, the MDL court has scheduled a pre-motion conference for April 4, 2013. It is anticipated that Defendants will file a motion to dismiss sometime in April or May 2013.

On March 21, 2013, Defendants timely removed the Complaint to this Court.

[Doc. No. 1.]²

On March 22, 2013, Defendants filed a Notice of Potential Tag-Along Action with the JPML. (Declaration of Troy J. Hutchinson, Ex. 1.)

DISCUSSION

Defendants removed the Complaint to this Court on March 21, 2013. Accordingly, under Rule 81(c)(2)(C) of the Federal Rules of Civil Procedure, Defendants' deadline to respond to the Complaint is March 28, 2013. Defendants' motion comes before the original responsive pleading deadline has expired and, as such, this motion is governed by Rule 6(b)(1)(A), which provides, in pertinent part, as follows:

When an act may or must be done within a specified time, the court may, for good cause, extend the time:

- (A) with or without motion or notice if the court acts, or if a request is made, before the original time or its extension expires.

Fed. R. Civ. P. 6(b)(1)(A).

The JPML has ordered that all actions that "share factual questions arising out of allegations that Frito-Lay markets and labels certain food products grown from genetically modified organisms as 'All Natural,' in a manner that is allegedly misleading to consumers" be centralized for consolidated pretrial proceedings in the Eastern District of New York. Transfer Order, MDL No. 2413 (J.P.M.L.), ECF No. 28.

²The parties previously agreed that Defendants would have until March 22, 2013 to respond to or remove the Complaint to federal court.

The allegations in the Complaint share factual questions arising out of allegations that Frito-Lay markets certain food products grown from genetically modified organisms as “All Natural” in a manner that is allegedly misleading to consumers. *See Compl.* ¶ 1. Consequently, Defendants believe that this Complaint should be consolidated with the eleven other previously filed complaints in the MDL Action.

Defendants respectfully request an extension of time to respond to the Complaint until fourteen (14) days after the JPML has issued a final disposition as to whether this Complaint will be transferred to the Eastern District of New York.³

Extending Defendants’ deadline to respond in this Court would avoid the risk of inconsistent judgments and the unnecessary duplication of judicial energies caused by having separate motions to dismiss that are predicated on the same legal arguments filed by Defendants in both this Court and the MDL court. If the JPML ultimately transfers this action for consolidation with the MDL Action, then the short delay of Defendants’ deadline to move to dismiss saves both judicial resources, and the time and expense of the parties, that would be unnecessarily wasted in a duplicative proceeding. As such, good cause exists under Rule 6 to extend Defendants’ response deadline until fourteen (14) days after the JPML makes a final determination of whether this Complaint should be transferred to the Eastern District of New York and consolidated with the MDL Action.

³ Alternatively, Defendants respectfully request a thirty-day extension of their response deadline.

CONCLUSION

For good cause shown, Defendants respectfully request that the Court grant an extension of Defendants' response deadline until fourteen (14) days after the JPML issues a final ruling on whether this Complaint will be transferred to the Eastern District of New York for consolidation in the MDL Action.

RESPECTFULLY SUBMITTED,

DATED: March 25, 2013

s/Troy J. Hutchinson
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